An Imbalanced Public Concern: The Case for Strict Scrutiny of Pure Freedom of Association Cases in Public Employment

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I. INTRODUCTION

Joseph LaPosta joined the police force hoping to gain more experience within the Borough of Roseland Police Department, for which he had been working as a dispatcher.[1] He completed the necessary training at the police academy and received his assignment as a police officer.[2] Upon his assignment, Officer LaPosta wished to join a union and chose the Policeman's Benevolent Association ("PBA") local, instead of the popular Fraternal Order of Police ("F.O.P.") local.[3] The Chief of Police, however, warned Officer LaPosta that PBA membership was off-limits to any officers.[4] Nevertheless, Officer LaPosta asserted his First Amendment freedom of association and joined the PBA, despite the Chief's threat.[5] In response, Officer LaPosta was:

> [R]efused compensation for work assignments; denied the opportunity to attend training sessions that would have advanced his career; singled out for disciplinary

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1 Complaint at ¶ 5, LaPosta v. Borough of Roseland, No. 06-CV-5827 (DMC), 2006 WL 5201137 (D.N.J. Dec. 5, 2006).

2 *See id.* ¶ 6, at 3.

3 *Id.*

4 *Id.*

5 *Id.*¶ 7, at 3; U.S. CONST. amend. I.

> action to which other officers (who were affiliated with the 'correct' union) were not subjected; and subjected to a hostile work environment that prevented him from performing basic work functions and advancing in rank. [6]

The government as a public employer needs "far broader powers" over its employees to conduct government affairs than those powers necessary to conduct similar affairs concerning private citizens.[7] This need arises from the interests of the public employer in efficiency and productivity that are especially significant in the public workplace.[8] Such interests in efficiency, though, must outweigh the First Amendment interests of the public employee when decisions adversely impact the First Amendment freedoms of the employee.[9]

The First Amendment protects, *inter alia*, the freedoms of speech and association.[10] How much protection an individual receives for their speech or associations while in the course of their employment varies depending on whether the employee works in the public or private sector.[11]

Public employee First Amendment speech and association protection has not been simple. Courts have failed to demarcate speech from association, resulting in a hodgepodge of decisions that crafted a messy and confusing analysis. The evolution of Supreme Court jurisprudence for freedom of speech claims, though, is pretty clear. For a plaintiff to demonstrate a First Amendment claim for violation of their speech rights in the course of their public employment, he or she must prove they spoke as a citizen on a matter of public concern, and protection of their First Amendment interests outweighs the public employer's interests in workplace efficiency and harmony.[12] However, since the Supreme Court has not delineated where the freedom of speech ends and the freedom of association begins; the analysis becomes hazy

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[6] LaPosta v. Borough of Roseland, No. 06-CV-5827 (DMC), 2009 WL 2843901, at *1 (D.N.J. Sept. 1, 2009).

[7] Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion); *see, e.g.*, Piscottano v. Murphy, 511 F.3d 247, 268 (2d Cir. 2007) ("When acting as an employer, 'the State has interests . . . in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'") (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

[8] *See Piscottano,* 511 F.3d at 269.

[9] *See infra* Part II.A.4; *cf.* Ramona L. Paetzold, *When Are Public Employees Not Really Public Employees? In the Aftermath of* Garcetti v. Ceballos, 7 FIRST AMEND. L. REV. 92, 101 (2008) (noting private employees receive less First Amendment speech protection because employment conflicts regarding employee speech are "private concerns").

[10] *See generally* discussion *infra* Part II. The First Amendment also establishes rights for the press, assembly, petitioning. *See* U.S. CONST. amend. I.

[11] *Cf.* Paetzold, *supra* note 9, at 101 (noting private employees receive less First Amendment speech protection because employment conflicts regarding employee speech are "private concerns").

[12] *See* discussion *infra* Part II.A.

when a public employee asserts a First Amendment claim based on a freedom of association theory. Courts have tried to apply this speech-specific analysis to freedom of association claims without serious consideration of the similarities and differences of the speech and association freedoms, so plaintiffs, like Mr. LaPosta, who engaged in association-only activities that involved absolutely no speech qualities received no protection because they could not show that their associational activity constituted a matter of public concern.[13]

The circuits are split over whether the associational interest should be a "matter of public concern" in evaluating associational cases like Officer LaPosta's—pertain to issues of government operations, for instance—as the *Pickering/Connick/Garcetti* test for speech cases requires.[14] The Seventh Circuit, for example, applies the public concern test to association cases, but the Tenth Circuit has explicitly rejected such application and, instead, applies only the latter part of the *Pickering/Connick/Garcetti* test—the *Pickering* balancing test, which considers the government's interest in efficiency and productivity and the public employee's interest in First Amendment protection.[15]

Alternatively, public employees receive maximum First Amendment protection for political affiliation and expression through the freedom of association; such cases are subject to a strict scrutiny analysis.[16] The courts' different treatment of public employee association and speech implies a recognition that speech and association are not the same and, as such, do not necessarily require the same analysis.[17] This distinction, unfortunately, has not been acknowledged; courts have mechanically applied an analysis developed for speech cases to associational cases that in no way implicate speech.[18]

The key to determining whether the common speech or a strict scrutiny analysis applies depends where along the speech-associational continuum a given case lies.[19] As discussed, *infra*, the more an associational freedom is involved, the stronger the case for a strict scrutiny analysis.[20] This Comment argues that the point at which a case involves no overt speech—thus, is purely associational—should trigger a strict scrutiny analysis.[21]

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13 *See* discussion *infra* Part III.
14 *See* discussion *infra* Part III.
15 *See* discussion *infra* Part III.
16 *See* discussion *infra* Part II.B.
17 *See* discussion *infra* Part II.
18 *See* discussion *infra* Part III.B.
19 *See* discussion *infra* Part IV.
20 *See* discussion *infra* Part IV.D-E.
21 *See* discussion *infra* Part IV.

Part II will discuss the muddled evolution of public employee speech law from *Pickering v. Board of Education* through the recent Supreme Court decision in *Garcetti v. Ceballos*, including the *Pickering* balancing test and the public concern requirement, as well as the recognition of freedom of association under the First Amendment in the public employment context. Part III takes up the current circuit split over the application of the public concern test to association cases. Part IV asserts within the speech/association continuum exists a bright line distinction between hybrid speech/association and pure association cases and argues a strict scrutiny analysis should apply in pure association cases.

II. PUBLIC EMPLOYEES' FIRST AMENDMENT SPEECH AND ASSOCIATION PROTECTIONS: FAR FROM DISTINCT

A. Freedom of Speech: *Pickering/Connick/Garcetti*—The Narrow(ing) Approach

According to Justice Souter, "[o]pen speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment."[22] The choice of a citizen to become an employee of the government, though, does not automatically forfeit First Amendment protection.[23] Some First Amendment protection is advantageous, not only for the employee but society as well, as the unique position of government employees in public service contributes valuable perspective to the public discourse.[24] Additionally, a public employee, while serving in an important and unique role in the workforce, is still a citizen.[25]

Still, public employees waive certain private rights upon entry into public service[26] because the public employer has an interest in an efficient and productive workforce and needs sufficient power over the workforce to ensure proficiency in services.[27] Moreover, public employees, in their capacity as public servants and government representatives, are constantly under the

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22 Garcetti v. Ceballos, 547 U.S. 410, 428 (2006) (Souter, J., dissenting).

23 *See id.* at 417 (majority opinion).

24 *See id.* at 419. The Supreme Court in *City of San Diego v. Roe* notes without the "informed opinion" of public employees, the value of public discourse regarding important concerns would be diminished. 543 U.S. 77, 82 (2004) (per curiam).

25 *Garcetti*, 547 U.S. at 419.

26 *See id.* at 418. *Contra* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (1892) ("A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

27 *Garcetti*, 547 U.S. at 418.

watchful eye of the public at-large and could persuade the community on points of view contrary to government positions; such dissention could negatively affect efficiency and productivity.[28]

Consequently, recent Supreme Court decisions have attempted to find an adequate balance among the rights of the public employee to receive First Amendment protection as a citizen, the need for the public to have valuable public discourse, and the government's interest of in efficiency and productivity of its workforce to carry out "important public functions."[29]

1. Balancing Pickering

In *Pickering v. Board of Education*, Marvin Pickering, a teacher, sent a letter to the editors of a local newspaper criticizing decisions by the Board of Education regarding financial expenditures, treatment of teachers, and quality of schools' facilities.[30] He signed the letter with his full name but asserted his opinion represented his views as a private citizen.[31] Consequently, the Board terminated Pickering on the basis that Pickering had forfeited his right to speak out on school policies when he was hired as a teacher.[32]

Pickering sued and claimed his letter fell within the purview of the First Amendment.[33] The Supreme Court, giving birth to the infamous *Pickering* balancing test, weighed "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees."[34] Acknowledging that Pickering's letter was directed at the Board, and not his immediate supervisors, the Court found his speech did not sufficiently constitute insubordination nor cause workplace disharmony. [35] Moreover, Pickering's position as a teacher was not directly related to the substance of the letter; the Court held Pickering's First Amendment interests

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[28] *See id.* at 419.

[29] *See id.* at 420.

[30] Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968). The impetus for the letter was a proposed transportation tax increase to pay for school district expenses. *Id.* at app. 575-78.

[31] *Id.* at app. 578. Pickering stated, "I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration." *Id.*; *cf. infra* Part II.A.3 (discussing adoption by Supreme Court of "as a citizen" requirement for First Amendment public employee speech protection).

[32] *See Pickering*, 391 U.S. at 564-65, 567.

[33] *Id.* at 565.

[34] *Id.* at 568; *see* EDWARDS, ET AL., FREEDOM OF SPEECH IN THE PUBLIC WORKPLACE: A LEGAL AND PRACTICAL GUIDE TO ISSUES AFFECTING PUBLIC EMPLOYMENT 31 (Am. Bar Assoc. 1998).

[35] *See Pickering*, 391 U.S. at 569-70.

outweighed the State's interest in abating insubordination and workplace disharmony.[36]

2. Connick's *Concern With Public Concern*

In *Connick v. Myers*, the Court affirmed the application of the *Pickering* balancing test to public employee speech cases but narrowed the protection of the First Amendment.[37] Particularly, the Court held that a public employee does not receive First Amendment protection unless the employee speaks regarding "matters of public concern." [38]

Myers, an Assistant District Attorney, opposed a transfer proposal from her supervisor, Connick.[39] She voiced her opposition to Connick, but he transferred her nonetheless.[40] Myers then circulated a questionnaire to other assistant district attorneys in the office to gather information from her colleagues in regards to their opinions about the transfer policy as well as whether coworkers perceived pressure from their superiors to support political campaigns.[41] After learning of the questionnaire, Connick terminated Myers for her rejection of the transfer and insubordination in distribution of the questionnaire.[42] Myers sued and claimed her termination violated her First Amendment freedom of speech.[43]

The Supreme Court examined the evolution of rights afforded to public employees over the course of the twentieth century, concluding precedent afforded public employees liberty to engage in public affairs without interference from the government solely on the basis that such engagement is subversive.[44] The Court found that one of the questions in Myers' questionnaire related to a matter of public concern, which was one of the factors of Connick's termination decision, namely, the question regarding perceived pressure from superiors to work for political campaigns.[45] The Court

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[36] *See id.* at 569-70 (discussing the State's interest as an employer in a harmonious workplace to maintain efficiency); *see also id.* at 574 (finding Pickering's First Amendment interests overcome the State's interest as an employer).

[37] Connick v. Myers, 461 U.S. 138, 154 (1983).

[38] *See id.* at 147. The Court explained further that federal courts are not the "appropriate forum" to review "personnel decisions taken by a public agency" regarding the employee's behavior. *Id.*

[39] *Id.* at 140.

[40] *Id.*

[41] *Id.* at 141.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 144-45.

[45] *Id.* at 149.

applied the *Pickering* balancing test, but *still* upheld Myers' termination.[46]

3. Speaking as a Garcetti *Citizen*

Pickering and *Connick* left open the question of whether the capacity in which a public employee speaks is a dispositive factor in First Amendment protection.[47] In *Garcetti v. Ceballos*,[48] the Supreme Court addressed this issue.[49]

Ceballos, a deputy district attorney, received a call from a defense attorney requesting Ceballos to investigate alleged discrepancies in a search warrant affidavit.[50] The investigation uncovered major discrepancies in the affidavit; Ceballos prepared a memorandum of his findings to his supervisors.[51] Despite Ceballos' findings concerning the affidavit, the district attorney proceeded with the prosecution.[52] At trial, Ceballos testified for the defense as to his findings of inaccuracies in the affidavit.[53] Subsequently, according to Ceballos, as retaliation he was reassigned to another position, and was passed over for a promotion because of his testimony; he sued, alleging the retaliation violated his First Amendment rights.[54]

The Supreme Court narrowed the *Pickering* balancing test, holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[55] The Court looked to *Pickering* and its progeny and recognized a

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46 *Id.* at 150, 154.

47 *Compare* Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968) ("[T]he amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position *as a teacher* in the district did not qualify him to speak with any greater authority than any other taxpayer.") (emphasis added), *with Connick*, 461 U.S. at 147 ("We hold only that when a public employee speaks not *as a citizen* upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.") (emphasis added).

48 Garcetti v. Ceballos, 547 U.S. 410 (2006).

49 *Id.* at 413.

50 *Id.*

51 *Id.* at 414.

52 *Id.*

53 *Id.* at 414-15.

54 *Id.* at 415.

55 *Id.* at 421.

two-pronged analysis for public employee speech First Amendment claims:

> The first requires determining whether the employee spoke *as a citizen* on a *matter of public concern*. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question [then] becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.[56]

These inquiries, the Court recognized, present difficulties due to the wide spectrum of factual scenarios in which disparaging statements by public employees might lead to termination or discipline.[57] Notwithstanding, the Court aimed to uphold the purposes of public employees' First Amendment speech protection and held, "so long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[58]

The fact that Ceballos wrote his memorandum as an official opinion in the course of his official duties was controlling; the fact that he expressed his opinions in the office, as opposed to publicly, and spoke to matters of his employment, however, were not dispositive.[59] Based on these findings, the

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[56] *Id.* at 418 (citations omitted) (emphasis added). While the Court describes its analysis as a two-step approach, the analysis is more easily understood as a three-step analysis. First, it must be determined whether the employee spoke as a citizen. If the answer is no, meaning the employee spoke within their official duties, then the analysis proceeds. Note that because the issue of whether or not Ceballos spoke as a citizen was not in dispute, the Court does not provide guidance as to how the analysis proceeds if as a matter of fact the employee spoke outside their official duties as a citizen. *See infra* discussion accompanying note 64. Next, the analysis turns to the subject-matter of the employee speech as a matter of public concern. If the speech was not relevant to a matter of public concern, the employee receives no First Amendment protection. If the speech was on a matter of public concern, the analysis continues. The last step balances the government employer interest in restricting the speech, which essentially is the *Pickering* balancing test. *See supra* Part II.A.1.

[57] *Garcetti*, 547 U.S. at 418 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968)) (quotations omitted).

[58] *Id.* at 415.

[59] *Id.* at 420-21. Justice Kennedy noted:

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself had commissioned or created. Contrast, for example, the expressions made by the speaker in Pickering, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Id. at 421-22 (citations omitted).

Court held Ceballos did not have a claim to speech protection under the First Amendment.[60]

The Court postulated that only affording protection for speech in instances where the public employee spoke as a citizen would not chill public employee participation in public discourse, as public service does not forfeit their participation privately; the First Amendment still provides protection.[61] Further, exclusion of official speech from First Amendment protection grants public employers acceptable managerial freedom to ensure consistent official communications.[62] Such a rule is reasonable and limited, Justice Kennedy posited, as public employees do not receive any less First Amendment speech protection than private employees, and the rule only proscribes dissident or insubordinate speech expressed in the course of official duties, not "statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment."[63]

Pickering, Connick, and Garcetti attempted to synthesize and simplify the First Amendment protection of public employee speech while at the same time giving deference to the need of the government employer to regulate the workplace so as to best accomplish its goals. Synthesizing these cases, the *Pickering/Connick/Garcetti* test emerges to analyze First Amendment claims by public employees for speech protection: (1) the public employee spoke as a citizen; (2) on a matter of public concern; and (3) the First Amendment

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60 *Garcetti*, 547 U.S. at 422, 424.

61 *Id.* at 422.

62 *Id.*

63 *Id.* at 424 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983)). The Court pointed to a bright line between public statements made within official duties and statements made outside those duties, or as a citizen:

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper or discussing politics with a co-worker.

Id. at 423 (citations omitted); *cf.* Pickering v. Bd. of Educ., 391 U.S. 563, app. 576 (1968) (finding Mr. Pickering wrote a letter to the editors of the local newspaper and signed the letter "as a citizen, taxpayer and voter, not as a teacher").

Justice Kennedy encouraged public employers to develop internal procedures, for example, that would provide employees an opportunity to offer criticism so as to "discourage them from concluding that the safest avenue of expression is to state their views in public." *Id.* at 424. *But compare id.* at 427 (Stevens, J., dissenting), for the argument that the rule does not provide a bright line between speech that is and is not in the course of an employee's official duties. Instead, Justice Stevens argues the rule encourages employees to publicly express concerns, not speak with supervisors first. *Id.*

The Court also limited application of the holding to the facts. The parties did not dispute that Ceballos wrote the memorandum pursuant to his duties, so the Court did not have the opportunity to enunciate a clear analysis for when the scope of the employee's duties is at issue. *Id.* at 424.

interests of the employee outweigh the interests of the public employer (*Pickering* balancing test).[64] The next section will demonstrate the confines of the second and third elements to illustrate how the analysis impacts different fact scenarios.[65]

4. Balancing the Public Concern

a. A Matter of Public Concern

Speech of a matter of public concern appertains "to any matter of political, social, or other concern to the community."[66] Courts look to the "content, form, and context of a given statement, as revealed by the whole record."[67] Moreover, the inquiry is relevant only when such statements negatively affect public employer efficiency.[68]

According to the *Connick* Court, matters of public concern include statements made to inform the public of a governmental arm's breach of duties.[69] The public concern inquiry, however, "is not an exact science,"[70] and the contentious nature of the statement is of no consequence to the analysis.[71] Specifically, matters of public concern have included information or

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[64] The speech must also have been a substantial or motivating factor in the employer's adverse decision, and the adverse decision would not have occurred in the absence of the employee's speech. *See* Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (discussing the but-for causation analysis of public employee First Amendment speech claims).

[65] To maintain the narrow scope of this Comment, the analysis will focus only on the relevant prongs of the *Pickering/Connick/Garcetti* test: the public concern and *Pickering* balancing prongs. *See infra* Part II.A.4.

[66] *Connick*, 461 U.S. at 146.

[67] *Id.* at 147-48; *cf. infra* text accompanying note 88 (noting that context of the employee's statement is also relevant for the *Pickering* balance). *But see Connick*, 461 U.S. at 157-58 (Brennan, J., dissenting)

> ("[T]he Court distorts the balancing analysis required under *Pickering* by suggesting that one factor, the context in which a statement is made, is to be weighed twice – first in determining whether an employee's speech addresses a matter of public concern and then in deciding whether the statement adversely affected the government's interest as an employer.").

[68] *Connick*, 461 U.S. at 157 (Brennan, J., dissenting) (citations omitted). Plaintiff carries the burden to demonstrate their speech related to a matter of public concern. Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009) (citing Connick v. Myers, 461 U.S. 138 (1983)).

[69] *Connick*, 461 U.S. at 148.

[70] Huppert v. City of Pittsburg, 574 F.3d 696, 703 (9th Cir. 2009) (quoting Weeks v. Bayer, 246 F.3d 1231, 1234 (9th Cir. 2001)).

[71] Rankin v. McPherson, 483 U.S. 378, 387 (1987).

statements about: sexual harassment by public employees,[72] wasteful government spending,[73] corruption,[74] and public safety[75] to name a few.

The public concern scope is limited, though.[76] If the content of the statement only indirectly relates to a public concern, for example, the speaker has an ulterior or personal motive for making the statement, the court might find the statement to fail the public concern threshold.[77] Simplistically, statements about personal grievances irrelevant to public perception of government operations are generally outside the scope of public concern. In addition, "passing references to public safety" if unrelated to the main purport of the statement, offset any connection to public concern.[78]

In *Dixon v. Kirkpatrick*, Plaintiff Dixon was an investigative assistant to the Oklahoma Board of Veterinary and Medical Examiners ("OBVME")

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[72] Hughes v. Region VII Area Agency on Aging, 542 F.3d 169, 182 (6th Cir. 2008). In *Hughes*, the Sixth Circuit reversed the district court finding of failure to show public concern where a public employee, after being sought out by a newspaper reporter, discussed with the reporter pending allegations of sexual harassment against the executive director of the agency, and the employee's opinion that another employee was terminated for suggesting an investigation of the executive director and the allegations. 542 F.3d at 181-82.

[73] Chaklos v. Stevens, 560 F.3d 705, 713 (7th Cir. 2009). In *Chaklos*, the Seventh Circuit held that a letter to a state procurement official criticizing an award of a government contract without competitive bidding on the basis that competitive bidding would be cost beneficial was a matter of public concern. *Id.*

[74] *Huppert*, 547 F.3d at 704.

[75] Redd v. Dougherty, 578 F. Supp. 2d 1042, 1052 (N.D. Ill. 2008). The *Redd* Court held statements by a correctional officer to a detective concerning a crime she witnessed were of a matter of public concern. *Id.*

[76] Desrochers v. City of San Bernardino, 572 F.3d 703, 709-710 (9th Cir. 2009).

[77] *Id.* at 710. In *McCullough v. University of Arkansas for Medical Sciences*, the Eighth Circuit found a primary personal motive and rejected the plaintiff's claim of speech as a matter of public concern because the plaintiff "filed his complaints only after the college asked him to respond to the complaints of sexual harassment against him. He thus did not inform the public about alleged sexual harassment at [the school] in the first instance on his own initiative." 559 F.3d 855, 866 (8th Cir. 2009).

[78] Robinson v. York, 566 F.3d 817, 823 (9th Cir. 2009) *quoted in Desrochers*, 572 F.3d at 711. In *Desrochers*, police officers filed a grievance against their supervisors, citing the managerial approach of the supervisors negatively impacting unit efficiency. 572 F.3d at 706-07. The Ninth Circuit held the police officers' grievance did not address a matter of public concern because the allegations in the grievance did not show incompetence or malfeasance by the supervisors. *Id.* at 712. In a comical but illustrative point, the Ninth Circuit posited:

> What if we judges prohibited our law clerks from taking coffee breaks? Suppose they responded with a memorandum complaining about the action. While they might assert—perhaps fairly—that caffeine deprivation would adversely affect their performance, morale, efficiency, and thus, their competency, no one would seriously contend that such speech addressed a matter of public concern.

Id. at 711.

investigator.[79] Dixon protested against the involvement of OBVME and its funds in a dogfighting ring investigation on the basis that such involvement exceeded the scope of its purpose; she expressed such opinions to her supervisor and the investigator, but her comments were ignored.[80] Dixon discussed her concerns about OBVME involvement in the investigation, as well as her complaints about the investigator and her supervisor with her veterinarian, a legislative committee member of a veterinarian organization in Oklahoma in hopes that he would push the legislative committee to intervene and stop the investigator.[81]

As part of its public concern analysis of Dixon's statements, the Tenth Circuit separated her statements into three categories: (1) complaints to her supervisor; (2) complaints to her veterinarian that OBVME involvement was improper; and (3) complaints to her veterinarian about the investigator and her supervisor.[82] The *Dixon* Court held the discussion with her veterinarian regarding the improper involvement of OBVME was a matter of public concern, but the other statements were not.[83]

The *Dixon* decision highlights the close and fact-intensive analysis necessary to determine matters of public concern, as well as the unpredictable nature of such analyses. Such unpredictability challenges the hasty extension of the public concern analysis to freedom of association claims.

b. *Pickering* Balancing

Upon a finding the employee spoke on an issue of public concern, the analysis, as well as the burden of proof, shifts to the *Pickering* balancing test.[84] The employer interests weighed are workplace harmony between employees,

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79 Dixon v. Kirkpatrick, 553 F.3d 1294, 1297-98 (10th Cir. 2009). Dixon was privy to confidential information about the investigations; she was to maintain confidentiality. *Id.* at 1298.

80 *Id.* at 1298-99.

81 *Id.* at 1298-1300.

82 *Id.* at 1303. The district court, however, did not distinguish Ms. Dixon's statements into different categories. *Id.*; *cf. supra* note 45 and accompanying text (discussing how the Court in *Connick* distinguished between different instances of speech in its public concern analysis by considering the questions in the questionnaire independently).

83 *Dixon*, 553 F.3d at 1303.

84 *Cf.* City of San Diego v. Roe, 543 U.S. 77, 84 (2004) ("Applying these principles to the instant case, there is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test. He fails the threshold test and Pickering balancing does not come into play."); Connick v. Myers 461 U.S. 138, 149-150 (1983) (noting the state bears the burden of justifying the adverse employment decision through the *Pickering* balancing analysis).

efficiency, and productivity.[85] Against the employer interests, courts weigh the potential chilling effect,[86] and the private nature of the employee's speech.[87] The "manner, time, and place" of the employee's statements are at the fulcrum of this balance.[88] Courts afford deference to the decisions of the employer to avoid "constitutionaliz[ing] the employee grievance."[89]

The *Pickering* Court found Pickering's position as a teacher and his relationship with the superintendent too far removed to claim "personal loyalty and confidence" to be essential to Board productivity; thus, Mr. Pickering's speech was protected.[90] In *Connick*, though, the Court concluded the questionnaire affected office efficiency and operation,[91] as certain questions in the questionnaire potentially undermined office relations.[92] Accordingly, the questionnaire was more of a personal grievance against her transfer, and the Court upheld Myers' termination.[93]

The public concern and *Pickering* balancing tests seek to give public employers some leverage and power to control their workplaces by severely limiting the scope of protection of employees' speech. This limited scope makes sense; statements by employees could easily be interpreted as statements by the government and incite public backlash. Limiting the scope of protection acts as a deterrence against impulsive speech and seeks to make employees think twice before they open their mouth. Is such deterrence and aforethought contemplation necessary to government function, however, when

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[85] ISIDORE SILVER, 2 PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE 1055 (Aspen Publishers, 3d ed. 2001).

[86] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (noting that threats of termination are a form of a chilling effect on speech).

[87] *Connick*, 461 U.S. at 153 n.13 (1983) ("Employee speech which transpires entirely on the employee's own time, and in non-work areas of the office, bring different factors into the Pickering calculus, and might lead to a different conclusion.").

[88] *Id.* at 152.

[89] *Id.* at 154 ("It would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance . . . .").

[90] *Pickering*, 391 U.S. at 570; *see supra* Part II.A.1 (discussing facts in *Pickering*); *cf.* discussion *infra* Part III.B (discussing *Pickering* balancing test applied in Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989)).

[91] *Connick*, 461 U.S. at 151.

[92] *Id.* at 152.

[93] EDWARDS, ET AL., *supra* note 34, at 36; *cf.* Dixon v. Kirkpatrick, 553 F.3d 1294, 1309 (10th Cir. 2009) (holding the "termination of an employee for unauthorized disclosure of information about an ongoing investigation" to be "necessary to prevent the disruption of official functions or to insure effective performance by the employee."); discussion *infra* notes 146-154 and accompanying text (discussing *Pickering* balancing application in Balton v. City of Milwaukee, 113 F.3d 1036, 1040 (7th Cir. 1998)).

a public employee joins an organization?

B. Freedom of Association: The Strict Approach

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty" protected by the First Amendment.[94] In *NAACP v. Alabama ex rel. Patterson*, the Supreme Court recognized an individual's right to freely associate as an implicit freedom included in the First Amendment.[95] In *Roberts v. United States Jaycees*, the Supreme Court formally recognized the "right to associate for the purpose of engaging in those activities protected by the First Amendment,"[96] as protection of such activities from governmental intrusion would be meaningless "unless a correlative freedom to engage in group effort towards those ends were not also guaranteed."[97] The freedom to associate is necessary for preservation of "political and cultural diversity" as well as to "shield[] dissident expression from suppression by the majority."[98] These choices receive protection "because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[99] Applying strict scrutiny, the Court held that the government could severely burden the freedom of association so long as such burdens "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[100]

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[94] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (internal quotation marks omitted); *see generally* Faina Milman-Sivan, *Freedom of Association as a Core Labor Right and the ILO: Toward a Normative Framework*, 3 LAW & ETHICS HUMAN RIGHTS 109, 110 (2009) (discussing the nature of freedom of association and collective bargaining as a fundamental right and "meta-norm" within the UN's International Labour Organization).

[95] *Patterson*, 357 U.S. at 466.

[96] Roberts v. U.S. Jaycees, 468 U.S. 609, 617-618 (1984). The Court in *Roberts* recognized two categories of association protected under the First Amendment: intimate association and expressive association. Laura Curry Sloan, *Constitutional Law—First Amendment Right of Association—Roberts v. United States Jaycees*, 33 U. KAN. L. REV. 771, 771 (1985).; *see also Roberts*, 468 U.S. at 617-29.

Intimate association includes the "choices to enter into and maintain certain intimate human relationships." *Roberts*, 468 U.S. at 617-18. Expressive association, on the other hand, recognizes "a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618; Sloan, *supra*, at 771.

[97] *Roberts*, 468 U.S. at 622.

[98] *Id.*

[99] *Id.* at 618; Sloan, *supra* note 96, at 771.

[100] *Roberts*, 468 U.S. at 623; Clingman v. Beaver, 544 U.S. 581, 586 (2005). Similarly,

In *Elrod v. Burns*, plaintiffs, non-civil service employees of the local sheriff's department, were discharged from their positions because they were not members of, nor supported, the Democratic Party.[101] The Supreme Court considered whether plaintiffs' discharge solely on the basis of their nonaffiliation with a political party violated the First Amendment.[102]

Writing for the majority, Justice Brennan equated the actions of the sheriff's department to be "tantamount to coerced belief,"[103] as protection of the choice to associate with a political party is essential to the tenets of the First Amendment.[104] The Court found the dismissals to be unconstitutional violations of plaintiffs' rights under the First Amendment,[105] as plaintiffs were employed in nonpolitical positions, not in the types of government employment where "party affiliation may be an acceptable requirement."[106] Moreover, the dismissals did not promote efficiency and productivity through the least restrictive means available.[107] Any government interest the patronage system advanced did not justify the violation of First Amendment protection.[108]

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state regulations that "impose lesser burdens," might "justify reasonable, nondiscriminatory restrictions" upon a showing of "important regulatory interests" by the government. *See Clingman*, 544 U.S. at 587 (referencing Timmons v. Twin Cities Area New Party, 520, U.S. 351, 358 (2007)).

The requirement of a compelling state interest to justify government infringement upon a person's expressive association is also known as the "preferred freedom" concept. Sloan, *supra* note 95, at 775.

[101] 427 U.S. 347, 351 (1976).

[102] *See id.* at 349.

[103] *See id.* at 355.

[104] *Id.* at 357 (citing Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973)).

[105] *See id.* at 372-373 (finding the dismissals unconstitutional under the first and fourteenth amendments).

[106] Branti v. Finkel, 445 U.S. 507, 517 (1980) (discussing Elrod v. Burns, 427 U.S. 347, 375 (1976)).

[107] *See Elrod*, 427 U.S. at 373. "[P]atronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics since political parties are nurtured by other, less intrusive and equally effective methods." *Id.* at 372-73.

[108] *Id.* at 373.

In another patronage case, *Branti v. Finkel*, the Court held the county government could not condition employment of an assistant public defender upon their support of the political party in control. 445 U.S. at 519. Because a public defender in representing indigent defendants has a duty only to their individual clients, not to the public as adversaries to the government, partisan political interests are not germane. *Id.* The Court also noted:

> The primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way.

See id. (citing Ferri v. Ackerman, 444 U.S. 193, 204 (1979)); *see also* Rutan v. Republican

In *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, the Supreme Court, applying a strict scrutiny analysis, considered the impact of the Hatch Act on the First Amendment rights of federal employees.[109] At the time of the Court's decision in 1973, Section 7324(a)(2) of the Hatch Act prohibited an executive agency employee from taking "an active part in political management or in political campaigns"[110] Evaluating the history leading up to the Hatch Act, as well as findings included in subsequent amendments,[111] Justice White concluded that sufficient bases for limiting the First Amendment political expression of federal employees

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Party of Ill., 497 U.S. 62, 64-65 (1990) (holding the enforcement of a patronage system in employment by state governor's office to be an unconstitutional infringement on employees' First Amendment rights).

[109] *See* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413, U.S. 548, 564-565 (1973) [hereinafter *Letter Carriers*]; 5 U.S.C. § 7324 (2006).

The strict scrutiny analysis is apparent by some of the Court's language. To evaluate the interest of the federal government in restricting federal employee's political activities, the Court applied a *Pickering* balancing test. *Id.* at 564-65; *see supra* Part II.A.4.b (describing the *Pickering* balancing test). *Contra infra* Part IV.E.2 (arguing the *Pickering* balancing test as-applied today should be inapplicable to pure freedom of association claims). Specifically, the important end of the federal government is the "impartial execution of the laws," so "[i]t seems fundamental . . . that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party." *Letter Carriers*, 413 U.S. at 564-65.

Resembling a "least restrictive means test," the Court considered as part of its analysis that the restraints on federal employee partisan political activities "are not aimed at particular political parties, groups, or points of view, bur apply equally to all partisan activities of the type described [in the Hatch Act]." *Id.* at 564.

In dicta, the Court outlined the boundaries of what would be a constitutional constraint of the First Amendment freedom of association for federal employees:

> Congress had, and has, the power to prevent [federal employees] from holding a party office, working at the polls, and acting as party paymaster for other party workers. An Act of Congress going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention.

Id. at 556.

[110] *See* An Act to Prevent Pernicious Political Activities (Hatch Act), Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified as amended at 5 U.S.C. § 7324(a)(2), removing this restriction), *quoted in Letter Carriers*, 413 U.S. at 568. *But cf. Letter Carriers*, 413 U.S. at 568 ("Section 7324(b) privileges an employee to vote as he chooses and to express his opinion on political subjects and candidates . . . ."); 5 U.S.C. § 7324(b).

[111] *See Letter Carriers*, 413, U.S. at 557-564 (retracing the political concerns underlying the development of the Hatch Act).

existed.[112] In addition, the statute, according to the Court, was neither overbroad nor vague, as the statute expressly distinguished between prohibited and permitted political expression and provided procedures for an employee to ascertain the legal implications of their conduct.[113]

Elrod and *Letter Carriers* highlight the Court's recognition of the distinction between speech and association, and the need to treat those freedoms differently by affording association cases the heightened strict scrutiny analysis.[114] In addition, the freedom of association line of cases applies a much clearer analysis than the freedom of speech cases.[115] Both lines require a fact-intensive analysis, but, as will become clear, the complex freedom of speech analysis drawn from *Pickering*, *Connick*, and *Garcetti* is far too complex and discretionary, which has led to an inconsistent and sometimes mind-boggling application of the *Pickering/Connick/Garcetti* analysis by the lower courts.

III. CIRCUITS NOT SPLITTING THE DIFFERENCE: PUBLIC CONCERN-FOCUSED ANALYSIS BLURS SPEECH/ASSOCIATIONAL DISTINCTION

A. Public Concern Matters: *Piscottano v. Murphy*

Plaintiffs were employees of the Connecticut Department of Corrections (DOC); the DOC implemented adverse employment actions against the plaintiffs based on the plaintiffs' affiliation with the Outlaws Motorcycle Club (Outlaws).[116] DOC regulations proscribed "engaging in conduct that

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[112] *Id.* at 557-64. Justice White stated that the history of the Hatch Act and subsequent amendments suggested the Court's judgment:

> [W]ould no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited.

Id.

[113] *Id.* at 579-80.

[114] *See infra* Part IV.E.

[115] *See infra* Part IV.E.

[116] Piscottano v. Murphy, 511 F.3d 247, 253 (2d Cir. 2007). According to reports by local and federal law enforcement authorities, the Outlaws Motorcycle Club was "involved in the production and distribution of methamphetamines and in the transportation and distribution of ecstasy, marijuana, and cocaine;" rivals of the commonly known motorcycle gang Hells Angels; "other criminal activities including assault, kidnapping, weapons and explosives violations, arson, theft of motorcycles and motorcycle parts, fraud, money laundering, and extortion;" and prostitution. *Id.* at 254. Surveillance by local and state police of Outlaws Motorcycle Club parties revealed plaintiffs' involvement in the club either as

constitutes, or gives rise to the appearance of a conflict of interest" and "engaging in unprofessional or illegal behavior, both on and off duty, that could in any manner reflect negatively on the [DOC]."[117] DOC officials found plaintiffs in violation of department directives, terminated two plaintiffs, and ordered counseling for the remaining plaintiffs based on their affiliation with the Outlaws.[118] Plaintiffs filed claims alleging violations of "their First Amendment and due process rights to freedom of expressive association and freedom of intimate association by disciplining them on account of their membership in, and their association with members of the Outlaws."[119]

The Second Circuit, citing the Supreme Court in *Healy v. James*, posited that "[g]uilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights."[120] The Court subjected the "threat feared by the government" to a public concern analysis.[121] Public concern can be demonstrated in two ways: (1) the organization advocates for issues deemed a matter of public concern; or (2) an individual's membership, which constitutes vicarious "endorsement of the nature and character of the organization," where the organization's mission or purpose is a matter of public concern.[122]

In *Piscottano*, the plaintiffs conceded the Outlaws did not advocate for issues of public concern, so the Court imputed the findings of criminal activity to the plaintiffs.[123] The plaintiffs were not entitled to First Amendment protection, as the membership in or affiliation with the Outlaws "had the potential in several ways to disrupt and reflect negatively on DOC's

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members or by association. *See id.* at 254-55.

[117] *Id.* at 256 (internal quotation marks omitted).

[118] *Id.* at 253.

[119] *Id.* at 252.

[120] *Id.* at 268 (citing Healy v. James, 408 U.S. 169, 186 (1972) (internal quotation marks omitted)).

[121] *See Piscottano*, 511 F.3d at 273-74 ("[I]n order to prevail on a First Amendment freedom-of-expressive-association claim, a government employee must show, *inter alia*, that his expressive association involved a matter of public concern – just as would a government employee complaining of a violation of his right to freedom of speech."). *Accord* Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2004) (applying public concern analysis to freedom of association claim); Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993); Akers v. McGinnis, 352 F.3d 1030 (6th Cir. 2003).

[122] *Piscottano,* 511 F.3d at 274.

[123] *Id.* ("[W]e accept plaintiffs' concession to the extent that it meant that they are not engaged in expressive conduct on matters of public concern vicariously by reason of advocacy by the [Outlaws] itself."). *Id.* The Court not only imputed the activities of the local chapter, but of the entire national organization. *See id.* at 275 (noting "[t]he inference that their endorsement extends to other chapters of the Outlaws is supported by [the record] . . . .").

operations, and that DOC's interest in maintaining the efficiency, security, and integrity of its operations outweighed the associational interests of those plaintiffs."[124]

B. Balancing Nonverbal Protection Without Public Concern: *Flanagan v. Munger*

The Tenth Circuit has taken a different approach to the freedom of association claims by public employees.[125] In *Flanagan v. Munger*, the Tenth Circuit rejected extension of the *Pickering/Connick* test to an associational claim based on employees' membership in an association unrelated to their employment.[126] The Court applied only the *Pickering* balancing test, as "[a] court can still compare an employee's interest in free speech and his employer's interest in the efficient functioning of government even with nonverbal protected expression."[127] The Court elucidated:

> The principle that emerges is that *all* public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee – most typically, a private personnel

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[124] *Id.* at 278. The Court looked to DOC's interests in promoting staff safety and reducing risks of inmate violence; preventing plaintiffs' associations from interfering with investigations with other law enforcement agencies; avoiding appearance of impropriety through employment of correctional officers with the Outlaws; and ensuring correctional officers are not tempted to treat inmates unfairly because of the inmate's association with a rival group. *See id.* at 277.

[125] *Accord* Hatcher v. Bd. of Pub. Educ., 809 F.2d 1546, 1558 (11th Cir. 1987) (holding the public concern requirement "inapplicable to freedom of association claims."); Shrum v. City of Coweta, 449 F.3d 1132 (10th Cir. 2006) (holding public concern analysis does not apply in cases of retaliation for union activities); Teague v. City of Flower Mound, 179 F.3d 377 (5th Cir. 1999) (holding public concern analysis does not apply to "mixed speech" claims).

[126] *See* Flanagan v. Munger, 890 F.2d 1557, 1562 (10th Cir. 1989). The Court elaborated:

> Although the Supreme Court has extended the *Pickering/Connick* test to a case which involves speech at work but not about work, we do not believe that the *Pickering/Connick* public concern test logically extends two more steps to this case in which a public employee (1) engages in nonverbal protected expression which is (2) neither at work nor about work.

Id.

[127] *Id.* at 1562-1563. In support, the Court reasoned:

> The alternative test should be whether the speech involved is 'protected expression.' If the speech involved is protected expression, then the second half of the existing Pickering test—the balancing between the employee's right to free speech and the employer's right to curtail activity which interferes with the efficient operation of the office—should be applied.

Id. at 1564-65.

grievance.[128]

Plaintiffs were police officers who entered into a video rental store venture that also rented out adult films.[129] The Chief of Police received an anonymous letter alleging that police officers in his station co-owned a pornography store; the Chief ordered an investigation.[130] The investigation concluded plaintiffs' ownership of the store violated departmental regulations of off-duty employment.[131] The Chief notified plaintiffs of the investigation and asked them to remove all adult films from the store inventory or be subject to a reprimand; the plaintiffs complied.[132]

A local newspaper reporter contacted plaintiffs regarding a tip received that they operated a pornography store and plaintiffs would be reprimanded.[133] Plaintiffs arranged a meeting with the Chief to discuss the reporter's interest in the issue, and the Chief, "believing he had the consent of plaintiffs," revealed to the reporter details of the investigation of plaintiffs, as well as the plaintiffs' reprimands.[134] The newspaper ran numerous articles based on the information the Chief disclosed.[135] The Chief, despite Plaintiff's compliance with the Chief's request to remove the adult films from inventory to avoid reprimand, then issued written reprimands to the plaintiffs for violations of department regulations, including conduct unbecoming of an officer and for failure to obtain approval for off-duty employment.[136]

Plaintiffs filed suit; they alleged defendants violated their first amendment right of association.[137] The Court, applying only the *Pickering* balancing test, found Plaintiffs' expression protected by the First Amendment.[138] In applying its reasoning for rejecting the public concern test to the facts of the case, the Court explained:

> [T]he language used by the Supreme Court in explaining the public concern test indicates its inapplicability to the present fact situation. The Supreme Court requires that the employee's speech comment 'upon matters of public concern.' It is difficult to comprehend how each of the officer's owning of a one-quarter interest in a video store which rents a small portion of sexually explicit videos is making a 'comment' on any

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[128] *Id.* at 1565 (quoting Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985)).

[129] *Id.* at 1560. Adult films comprised less than four percent of the video inventory. *Id.*

[130] *Id.*

[131] *Id.* at 1560.

[132] *Id.* at 1560-61.

[133] *Id.* at 1561.

[134] *Id.*

[135] *See id.* at 1561.

[136] *Id.*

[137] *See id.* (detailing how one of the plaintiffs also alleged retaliation by the Chief for "[failure] to reappoint him as deputy chief, a position he had held in the department for ten years").

[138] *Id.* at 1562-1565 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

> subject, especially a subject of public concern. Owning a store that rents movies isn't necessarily commentary about the desirability of these films. This is not debate or explicit verbal speech.[139]

Balancing the plaintiffs' interest in engaging in their speech, which the Court found to be substantial,[140] against the "attenuated" interest of the police department in preventing "direct disruption, *by the speech itself*, of the [police department's] *internal* operations and employment relationships,"[141] the Court found the *Pickering* balance to favor plaintiffs.[142] The Court specifically held that the Chief violated the free speech and press rights of the plaintiffs "by prohibiting them from selling or renting sexually explicit video tapes and by reprimanding them for engaging in that activity."[143]

The material facts of *Piscottano* and *Flanagan* are very similar. Both cases involve choices by public employees to affiliate with organizations unrelated

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[139] *Id.* at 1563.

[140] *Id.* at 1565.

[141] *Id.* at 1566 (quoting Berger v. Battaglia, 779 F.2d 992, 1000 (4th Cir. (1985)) (internal quotation marks omitted). In *Berger v. Battaglia*, the Fourth Circuit applied the *Pickering* balancing test where a police officer performed off-duty in blackface, which members of the public found offensive. 779 F.2d 992 (4th Cir. 1985). The Court noted the factual differences between the facts in *Berger* and *Pickering*, but, according to the *Flanagan* Court, "gave no reasoning for extending *Pickering*" and seemed to apply "the test because of the inertia of previous decisions applying *Pickering* in employment cases. *Flanagan*, 890 F.2d at 1564 n.7 (citing Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985); Pickering v. Bd. of Educ., 391 U.S. 563 (1968)). The *Flanagan* Court analogized the facts of the instant case and *Berger*: "[b]oth cases involved off-duty entertainment "speech" by police officers which did not "add" to debate. Thus, the *Berger* case provides a persuasive prior resolution of very similar issues . . . ." *Id.* at 1564 n.7 (citing Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985).

The *Flanagan* Court found the police department's interest in preventing plaintiffs' expression to be attenuated because the police department's justification, that "if members of the public knew that offers were renting [sexually explicit videos] would erode the public's respect and confidence in the police department . . . . thereby inhibiting the efficiency and effectiveness of [the department] in the community", could not be sustained where no direct evidence in the record existed of disruption or impact on close working relationships, workplace efficiency or productivity. *See id.* at 1566.

The *Flanagan* Court further reasoned that the department's articulated interest in preventing the plaintiffs' expression was similar to the "heckler's veto," which Supreme Court precedent has rebuffed "as a justification for curtailing 'offensive' speech in order to prevent public disorder." *Id.* at 1566 (citing Edwards v. South Carolina, 372 U.S. 229 (1963); Terminiello v. Chicago, 337 U.S. 1 (1949)). The heckler's veto refers to disapproval of speech simply on the basis that the speech is offensive to members of the public and "for that reason may not cooperate with law enforcement officers in the future." *Id.* For this reason, as well as the above-discussed reasons, the Court characterized the department's case as "revolv[ing] solely around evidence of the potential disruption of the department's *external* relationships and operations." *Id.*

[142] *Flanagan*, 890 F.2d at 1567.

[143] *Id.*

to their public employment. Also, none of the plaintiffs in either case spoke out, directly or indirectly, about their affiliation with their respective organizations. Nevertheless, the courts in both cases forced an analysis tailored specifically for instances of public employee speech.[144]

IV. THE NEED FOR AN ALTERNATIVE APPROACH IN PURELY ASSOCIATIONAL CASES

Application of the analyses in the *Pickering/Connick/Garcetti* and *Elrod/Letter Carriers* lines of cases reveal two important fundamentals of the relationship between the First Amendment speech and association freedoms. First, speech and association are not intrinsically related; they can be mutually exclusive. Second, while speech is not necessary for association, and vice versa, they are related, and sometimes speech and association are so intertwined that it becomes difficult, or even impossible, to distinguish the two.[145] With these notions in mind, courts can determine where cases lie along the speech-association continuum in order to determine whether to apply a *Pickering/Connick/Garcetti* or *Elrod/Letter Carriers* analysis.

A. Pure Associational and Hybrid Speech/Association Cases

In *Balton v. City of Milwaukee,*[146] Plaintiffs were assistant chief dispatchers, not members of the union for the "rank and file" firefighters.[147] Assistant chief dispatchers were eligible to become members of the Chief Officers Association ("Association"), an organization that informally advocated for members on contract issues.[148] Plaintiffs both joined the Association under the assumption membership would provide salary and benefit increases.[149]

After joining the Association as dues-paying members, plaintiffs no longer saw the benefit of their membership in the Association and ceased payment of their dues.[150] The treasurer of the Association informed plaintiffs of their delinquent dues, and, after the plaintiffs still did not pay, the treasurer reported

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144 In fact, in *Flanagan*, the Tenth Circuit admitted the facts did not at all touch upon speech but applied the *Pickering* balancing test anyway, albeit dubiously. *See supra* notes 139-141 and accompanying text (discussing the reasoning for the holding in *Flanagan*).

145 *Cf. infra* Part IV.C.

146 Balton v. City of Milwaukee, 133 F.3d 1036 (7th Cir. 1998).

147 *Id.* at 1037.

148 *Id.* at 1037-38.

149 *Id.* at 1038. Until 1993, Plaintiffs were not eligible to join the association because of their status as assistant chief dispatchers. *Id.*

150 *Id.*

the non-payment to the deputy chief.[151] Not long after, the deputy chief completed a performance evaluation for each plaintiff; and they both received a below average evaluation of their "professional qualities".[152] In the performance evaluation, the deputy chief included a statement supporting his conclusions that contained references to the non-payment of dues by the plaintiffs, and that they "fail[ed] to realize the importance of the Association to the officers and the Department."[153] Plaintiffs filed suit in district court asserting a First Amendment freedom "not to associate" claim.[154]

On appeal, the Seventh Circuit observed an "important distinction" between the nature of speech and association claims in deciding whether to insist on a public concern demonstration:

> A *Pickering/Connick* balancing test, so useful in resolving public employee free speech cases, is not easily transferable to freedom of association cases. That's because some associational choices . . . are purely private matters. As such, one would think they would usually come up short in a private versus public concern balancing test. So strict reliance on *Pickering/Connick* presents potential problems . . . . [B]ecause *Connick's* public concern test grew out of a speech case, it may not appropriately recognize the important distinction between speech and association. This may lead, it can be persuasively argued, to insufficient protection of the associational rights of public employees.[155]

Nevertheless, the Court did not want to overturn Seventh Circuit use of the *Pickering/Connick* public concern test in associational claims but rather decided to "wait for a better case than this one to consider a different course."[156] As a result, the Court found the plaintiffs' dissatisfaction with the Association "had nothing to do with [the Association's] political, social, or religious goals – in short, with stands it took on matters of public concern" and ruled the plaintiffs were not entitled to First Amendment protection because their claims were nothing more than individual gripes.[157]

Judge Cudahy authored a separate opinion, in which he argued the Seventh Circuit cases cited by the majority were not applicable to the *Balton* case because those cases "involved both speech and association."[158] Reconsidering

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[151] *See id.*

[152] *Balton*, 133 F.3d at 1038-39.

[153] *Id.* at 1039.

[154] *Id.*

[155] Balton v. City of Milwaukee, 133 F.3d 1036, 1039-40 (citing Paul Cerkvenik, *Who Your Friends Are Could Get You Fired! The Connick "Public Concern" Test Unjustifiably Restricts Public Employees' Associational Rights*, 79 MINN. L. REV. 425, 446 (1994)). The district court applied a Pickering/Connick public concern analysis; plaintiffs appealed application of such analysis to their freedom of association claim to the Seventh Circuit. *See id.* at 1039.

[156] *Balton*, 133 F.3d at 1040.

[157] *See id.*

[158] *Id.* at 1041 (Cudahy, J., concurring). Judge Cudahy explained:

Marshall v. Allen, a Seventh Circuit case where an attorney sued when he was terminated for breach of a directive not to speak about "employment-related cases with colleagues who had filed discrimination cases against their employer", Judge Cudahy distinguished *Marshall* as appropriate for the public concern analysis because a court can easily assess the impact of the attorney's disregard for the directive on the "work relationship" and apply the *Pickering/Connick* test.[159] Contrastingly, "in the typical pure association case, the fact of association or of non-association has no impact on the work relationship and no balancing is necessary" as the "pure associational activities" are outside the workplace.[160]

Likewise, Judge Cudahy contended, "the *Pickering/Connick* test is cumbersome in the context of a pure association claim"[161] because the content, form, and context analysis[162] is difficult to apply where the substance of one's association cannot be clearly ascertained.[163] For these reasons, the *Pickering/Connick* public concern test, then, "do[es] not supply a relevant test for purely associational claims because such cases generally do not involve interference with the work relationship."[164]

B. The Pure Speech/Pure Associational Continuum

The underlying difference between cases like *Pickering*, *Connick*, and *Garcetti*, and *Piscottano*, *Flanagan*, and *Balton*, is the speech/association

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In *Gregorich v. Lund*, for example, the plaintiff alleged that he had been fired for engaging in union-organizing activity. That kind of activity involves speech and advocacy for the purpose of promoting membership in an association. But the mere act of joining or not joining a union—or a union-like organization like the Chiefs Association—involves the exercise of purely associational rights.

Id. at 1041 (citing Gregorich v. Lund, 54 F.3d 410, 411-412 (7th Cir. 1995).

[159] *Id.* at 1041 (Cudahy, J., concurring) (citing Marshall v. Allen, 984 F.2d 787, 790, 794 (7th Cir. 1993)).

[160] *Id.* at 1041 (Cudahy, J., concurring).

[161] *Id.*

[162] *See supra* notes 62-83 and accompanying text (discussing content, form, and context analysis in *Connick*).

[163] *Balton*, 133 F.3d at 1041 (Cudahy, J., concurring) ("But how does one neatly apply the content, form, and context analysis to a claim that [the deputy chief] retaliated against [the plaintiffs] because they refused to pay dues or wished to disassociate from the Chiefs Association?").

Judge Cudahy discussed *Griffin v. Thomas*, where an assistant principal claimed retaliation by her employer on the basis that she filed a grievance with the union. *See id.* (citing Griffin v. Thomas, 929 F.2d 1210, 1210 (7th Cir. 1991)). He posited the *Pickering/Connick* analysis was easy to apply in *Griffin* because "the court was able to review the substance of her grievance." *Id.*

[164] *Balton*, 133 F.3d at 1041.

distinction. In *Pickering*, *Connick*, and *Garcetti*, the plaintiffs received unfavorable employment decisions simply because of their overt speech in the course of their employment. Mr. Pickering sent his *letter* to the local newspaper; Ms. Myers distributed a *questionnaire* amongst her co-workers in the officer; Mr. Ceballos wrote a *memorandum* to his superiors voicing his concerns and testified to such.[165] All of these cases exemplify overt speech acts, which justify the application of the *Pickering/Connick/Garcetti* analysis to those cases.[166]

The *Piscottano*, *Flanagan*, and *Balton* cases, on the other hand, represent examples where public employees received unfavorable employment decisions simply because of membership in associations outside of their employment. The *Piscottano* plaintiffs were retaliated against for their membership in the Outlaws; the *Flanagan* plaintiffs were terminated for opening a video rental store outside their employment as police officers; and the *Balton* plaintiffs received unfavorable employment decisions for refusing to pay dues to an unofficial organization related to their positions because of their dissatisfaction with the performance of the Association.[167] Such cases are outside the purview of the *Pickering/Connick/Garcetti* speech analysis plainly because they lack

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[165] *See supra* notes 30, 41, 51 and accompanying text (discussing means of speech of each of the plaintiffs).

[166] *See supra* notes 22-25 and accompanying text (discussing the First Amendment and public employee speech); *see also* Craig D. Singer, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U. CHI. L. REV. 897, 905 n.57 (1992) (explaining how in Jones v. Dodson, 727 F.2d 1329, 1336 (4th Cir. 1984) "[The Court] held that if the motivation of the employer in firing the employee was purely one of political affiliation, then the *Elrod-Branti* test is the appropriate one, but if the employer was motivated 'to any significant degree by overt speech activity by the public employee,' then the *Pickering* test applies instead."). *See also supra* text accompanying notes 100-107 (discussing Elrod v. Burns, 427 U.S. 347 (1976)).

[167] *See supra* notes 116-119, 129-136, 146-154 and accompanying text (outlining facts of *Piscottano*; facts of *Flanagan*; and facts of *Balton*). One might argue the plaintiffs in *Balton* were members of an association pertaining to their employment since the Association represented the interests of assistant chief dispatchers in collective bargaining, albeit unofficially. *See supra* text accompanying notes 146-154 (discussing facts of *Balton*). While this argument is somewhat tenuous since the membership in the Association was not mandatory and did not qualify as a union (since the Association did not have any official right in collective bargaining negotiations), the *Balton* case still would not qualify as a hybrid case for purposes of analysis because the *Balton* plaintiffs did not make any overt speech or action as members of the Association. *See infra* Part IV.C; *supra* notes 158-164 and accompanying text (discussing J. Cudahy's distinction between hybrid and purely associational cases). Simply refusing to pay dues, and nothing more, because of their dissatisfaction with the Association is hardly overt; in addition, refusal to pay dues is wholly independent of their duties as assistant chief dispatchers. To qualify the refusal to pay dues as either overt speech or related to their employment would mean public employers could retaliate against public employees for failure to pay offerings at church, or gym membership fees, for example, and demonstrates the danger of such a slippery slope.

any overt speech or act on behalf of their association, and, except the *Balton* plaintiffs, membership in their respective associations were wholly independent of their employment responsibilities.[168]

C. The Hybrid Cases

In the middle, as Judge Cudahy pointed out in *Balton*, are the hybrid speech/association cases.[169] In *Hudson v. Craven*, for example, the Ninth Circuit found a teacher's claim of retaliation for participating in an anti-WTO protest with her students as part of a "de facto class field trip" to be a hybrid speech/association case.[170] Similarly, in *Melzer v. Board of Education*, the Second Circuit found a teacher's membership in the North American Man/Boy Love Association ("NAMBLA") to be a hybrid speech/association case as "the activity which prompted the Board to fire Melzer was not a specific instance of speech, or a particular disruptive statement, but an associational activity of which speech was an essential component."[171]

In *Hudson*, the associational expression drifted into the realm of public employee speech when Hudson protested at a rally with her students, and in *Melzer*, NAMBLA membership became essential public employee speech when Melzer discussed strategies with a fellow teacher on how to avoid discovery of their NAMBLA membership.[172] In contrast, *Piscottano*, *Flanagan*, and *Balton* clearly lack an essential speech component to their associational claims. The *Piscottano* plaintiffs did not advocate any speech as a

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[168] *See supra* notes 116-119, 129-136, 146-154 and accompanying text. The plaintiffs in *Piscottano* and *Flanagan*, in a sense, participated in these organizations "as citizens." *Cf. supra* notes and accompanying text 55-63 (discussing "as a citizen" analysis in Garcetti v. Ceballos, 547 U.S. 410 (2006)). The citizen versus public employee distinction from the public employee speech cases is instructive to determine whether a public employee's participation in an organization or association is wholly independent from their job as a public employee.

[169] *See supra* notes 158-160 and accompanying text (discussing hybrid and purely associational distinction); *see also* Herrera v. Med. Ctr. Hosp., 241 F. Supp. 2d 601, 609-10 (E.D. La. 2002) ("The Fifth Circuit recognizes that some speech contains both public and private elements. In cases of 'mixed speech,' the Fifth Circuit has ruled that courts 'are bound to consider the *Connick* factors of content, context and form, and determine whether the speech is public or private based on these factors.'") (quoting Teague v. City of Flower Mound, 179 F.3d 377, 382 (5th Cir. 1999)).

[170] *See* Hudson v. Craven, 403 F.3d 691, 693-96 (9th Cir. 2005).

[171] Melzer v. Bd. of Educ., 336 F.3d 185, 189, 194 (2d Cir. 2003); *see An Introduction to NAMBLA: Who We Are*, NAMBLA, http://www.nambla.org/welcome.htm (last visited Jan. 1, 2011). Melzer was a writer and editor of the NAMBLA publication, *The Bulletin*, and was videotaped guiding a fellow member and teacher on how to avoid discovery of the teacher's NAMBLA affiliation. *Melzer*, 336 F.3d at 189, 191.

[172] *Melzer*, 336 F.3d at 191.

public employee as part of their membership in the Outlaws; the *Flanagan* plaintiffs did not intersect their video rental store occupation with their jobs as police officers[173]; and the *Balton* plaintiffs did not speak out against the Association but merely stopped adhering to their obligation to pay dues.[174]

D. The Bright Line Test Emerges

From the above examples, a bright line analysis between the hybrid speech/association ("hybrid") and the purely associational ("pure") cases emerges. Courts should apply the following analysis to determine whether a First Amendment public employee case is hybrid or pure: (1) plaintiff asserts a First Amendment associational claim; (2) plaintiff's claim involves an essential speech component; and (3) there is a nexus between the essential speech component and the plaintiff's public employment. If none of the three elements are demonstrated, the facts present a pure case, and a strict scrutiny analysis, discussed *infra*, should apply.[175] If all three elements are met, the case qualifies as hybrid, and the *Pickering/Connick/Garcetti* public concern analysis should apply.

E. Application of Strict Scrutiny Analysis to Pure Cases

As discussed *supra*, the Supreme Court has applied a strict scrutiny analysis to public employee freedom of association political affiliation and expression cases.[176] Such an analysis is most appropriate for pure cases because it best preserves the First Amendment rights of the employee without encroaching unnecessarily on the government's need to promote efficiency, productivity, and harmony in the workplace.[177]

1. Advantage of Strict Scrutiny Analysis in Pure Cases

First, the strict scrutiny analysis provides the maximum protection of the First Amendment rights of public employees because it provides a minimum chilling effect on employees' association.[178] Since the pure cases do not

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[173] *Cf.* City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam) (holding a police officer's pornography website where the plaintiff performed sexual acts in a police uniform and sold police equipment was not protected under *Pickering/Connick*).

[174] *See supra* notes 146-154 and accompanying text (discussing facts of *Balton*).

[175] *See infra* Part IV.E.

[176] *See supra* Part II.B.

[177] *See supra* Part II.4.b.

[178] *See supra* note 86 and accompanying text (discussing the need to prevent a chilling

involve any overt speech by the public employee, the courts' deference to the government's interest in maintaining efficiency, productivity, and workplace harmony is unnecessary and misplaced. When the government's interest as an employer is no longer the focus, the courts should treat its actions as performed in the role of the sovereign, not the employer, and shift the burden from the employee to prove a public concern to the government to prove a compelling state interest in suppression of the public employee's association.[179]

Second, the strict scrutiny analysis creates predictable outcomes, as it prevents any discretion by the employees' supervisors and the courts. The determination of what is a matter of public concern and what is not is difficult and messy. It requires a very fact-intensive analysis that risks inconsistent application and indiscretion.[180] In pure cases, such discretion is inappropriate because the government's role as an employer is not a factor; thus, the compulsion to craft the analysis towards the outcome of giving the government leeway becomes misplaced.

Not all is lost for the government, though. The public employer still has some room to craft regulations and hand down employment decisions that affect a public employee's associational freedom so long as those actions are the least restrictive means.[181] Since the pure cases represent situations where the public employer has the least jurisdiction to regulate the First Amendment freedoms of its employees, any regulations in those situations must be strictly scrutinized to ensure maximum protection for the public employee. For example, in *Piscottano*, the Department of Corrections would be able to prescribe regulations to prevent employees similarly situated to the plaintiffs from engaging in certain illegal activity as members of the Outlaws, so long as the purpose of the regulations (preventing illegal activity by correctional officers) could not be attained by less restrictive means.[182]

2. *Disadvantages of* Pickering/Connick/Garcetti *Test*

The complexity of the *Pickering/Connick/Garcetti* test makes it ill-suited for

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effect).

[179] *See supra* Part II.B; *cf.* Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign.").

[180] *See supra* Part II.A.4.a.

[181] *See supra* note 107 (discussing least restrictive means requirement of strict scrutiny analysis); *cf.* People of State of New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 76-78 (1928) (affirming consideration of state legislature of the Ku Klux Klan's dangerous and violent activities.).

[182] *See supra* notes 116-119 and accompanying text (outlining the facts of *Piscottano*).

pure associational cases. Speech has wholly different implications because it is explicit expression, increasing the likelihood of imputation of the content and means of the expression to the government. Speech requires such special attention because the public could conclude the government adopts or supports the content or view contained in the employee's speech, as well as supports the manner in which the employee spoke, resembling guilt by association.[183] For example, Mr. Ceballos' defense testimony that an affidavit for an arrest warrant was defective created an appearance of impropriety that potentially had very serious effects on the public's impression of the office of the district attorney and government generally.[184] This risk of negative association with Mr. Ceballos' speech and, thus, speech of public employees generally, requires courts to give more deference to the public employer to properly protect state interests as the employer.

Association, however, as an implicit form of the expression of ideas, decreases the risk of associating the employee's content and means of expression through membership in an organization. The risk decreases in pure cases because the message and membership is ambiguous in meaning. *Balton* illustrates the potential ambiguities that an employee's membership in an association might have. To an outsider, the *Balton* plaintiffs' choice to join the Association might appear to be personally, economically, or socially motivated. Still, the risk of negative association with the *Balton* plaintiff's membership in the Association, or choice to leave the Association, is in no way significant enough to justify application of the public concern analysis. Even if *Balton* appears on it's face to be the constitutionalizing of the grievance process the *Pickering/Connick/Garcetti* analysis seeks to avoid, the heightened deference to the State's interests is unnecessary. The risk of negative effect on the State's public reputation may not be low, but the burden on the employee's First Amendment rights is comparatively much higher.

Additionally, the sequence of analysis in a public employee speech case compared to a freedom of association case demonstrates the preference of a strict scrutiny analysis for pure associational cases. The difference between speech and purely associational cases turns on the burden shifts. In a speech case, the elements are: (1) expression by public employee; and (2) adverse employment decision by public employer as a result of the expression.[185] At this point in other First Amendment cases, the government is supposed to bear

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[183] *See supra* notes 61-63 and accompanying text (emphasizing the need for a bright line rule between official and unofficial duties).

[184] *See supra* notes 50-54 and accompanying text (examining the pretenses of investigation present in *Garcetti*).

[185] *See supra* note 64 and accompanying text.

the burden of proof that the government action fell outside First Amendment protection.[186] Under the *Pickering/Connick/Garcetti* analysis, however, the burden stays on the plaintiff to demonstrate the "public concern" and "as a citizen" elements; it is not until these elements are satisfied that the burden finally shifts to the government to show the *Pickering* balance – that the government interests outweighed the employee's First Amendment protections.[187] With the strict scrutiny analysis, once the public employee demonstrates the association as the cause of the adverse employment decision, the burden properly shifts to the government to prove the compelling state interest and least restrictive means prongs.[188] As the negative impact risk is low, discussed *supra*, such a high burden of proof on the plaintiff is inappropriate in purely associational cases.[189]

Forcing the public employee to shoulder the burden of proof in purely associational cases makes the *Pickering/Connick/Garcetti* analysis underinclusive. Plaintiffs like Mr. LaPosta wishing to join a different union than the popular crowd are excluded from protection, but if Mr. LaPosta and the members of the popular union joined together because the Police Department retaliated on the basis of their general membership in a union, their expression would be protected. In a sense, Mr. LaPosta bears the burden of showing why the PBA is more of a public concern than the FOP, otherwise his claim is just a grievance, outside the protection of the First Amendment. Such an outcome is unsettling.

Moreover, application of the *Pickering/Connick/Garcetti* analysis to purely associational cases distorts the public-private divide. To hold public employees generally to the high standard of carrying the burden of acting as a public employee when they leave the office is not only unduly burdensome, but also discourages citizens to join the government workforce.

Lastly, the heightened burden on the plaintiff coupled with the fact-intensive analysis of the public concern prong and *Pickering* balancing severely undercuts the First Amendment protection of public employees. The content, context, and form of the expression examined by the public concern analysis and the manner, time, and place of the expression examined by the *Pickering* balance are so dependent upon each other, courts essentially perform the same analysis twice.[190] Meaning, even if a plaintiff can demonstrate the content and

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[186] *See supra* note 100 and accompanying text.

[187] *See* discussion *supra* Part II.A.4.

[188] *See supra* note 100 and accompanying text.

[189] This is not to say that the increased burden in speech cases through the *Pickering/Connick/Garcetti* is proper. Such an argument, however, is beyond the scope of this comment.

[190] *See* Connick v. Myers, 461 U.S. 138, 157-58 (1983) (Brennan, J., dissenting) ("[T]he

context of their association touches upon a matter of public concern, which is supposed to be afforded heightened protection, the government can defeat the plaintiff's claim by merely showing the government has an interest in suppressing the content and context of the employee's association and nothing more. Implicitly, then, the heightened protection afforded to the plaintiff through the public concern demonstration is effectively lost in the discretionary *Pickering* analysis. It is for this same reason that the *Pickering*-only analysis inadequately protects public employees in purely associational cases. Courts can implicitly apply the public concern test. Moreover, the focus on the efficiency of the workplace, coupled with the hostility towards intrusion or second-guessing of employer decisions eliminates any real difference between the two tests. [191]

V. CONCLUSION

Application of any element of the *Pickering/Connick/Garcetti* analysis, derived from public employee speech cases, is inappropriate in purely associational First Amendment public employee cases. The body of public employee freedom of association case law is in such disarray because of courts' erroneous imposition of some form of the *Pickering/Connick/Garcetti* analysis to purely associational cases. The freedoms of speech and association are too complicated for courts to resolve such cases with a one-size-fits-all approach. Courts need to conduct a fact-intensive analysis and first determine whether a case presents a purely speech, purely associational, or hybrid speech/association claim. Furthermore, in purely associational cases, a strict scrutiny analysis derived from the *Elrod/Letter Carriers* line of cases should apply to properly protect the First Amendment associational freedoms of public employees.

Court distorts the balancing analysis required under *Pickering* by suggesting that one factor, the context in which a statement is made, is to be weighed *twice* – first in determining whether an employee's speech addresses a matter of public concern and then in deciding whether the statement adversely affected the government's interest as an employer.") (emphasis in original).

[191] It is for this same reason that the *Pickering*-only analysis inadequately protects public employees in purely associational cases. Courts can implicitly apply the public concern test. Moreover, the focus on the efficiency of the workplace, coupled with the hostility towards intrusion or second-guessing of employer decisions eliminates any real difference between the two tests. *See* Paetzold, *supra* note 9, at 100 ("[C]oncern for the public employer's right to maintain efficiency was coupled with a judicial hostility toward allowing federal courts to intrusively interfere or second guess the public employer's judgments regarding how best to achieve that efficiency in public functioning."); Garcetti v. Ceballos, 547 U.S. 410, 422 (2006); *cf.* Paetzold, *supra*, at 100 (noting that federal courts hold the same animosity towards questioning private employer decisions as public employers).